Appeal No. UKEAT/0142/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 October 2018

Before

HIS HONOUR DAVID RICHARDSON

(SITTING ALONE)

MR F SPACEMAN APPELLANT

ISS MEDICLEAN LIMITED T/A ISS FACILITY SERVICE HEALTHCARE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL – Automatically unfair reasons

On the true construction of section 104(1)(b) of the **Employment Rights Act 1996**, there must be an allegation by an employee that there has been an infringement of a statutory right, not merely that the employer may, or will, or threatens to, or intends to infringe such a right. **Mennell v Newell & Wright (Transport Contractors) Limited** [1997] IRLR 519 considered.

Appeal dismissed.

HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Mr Felix Spaceman ("the Claimant") against the Judgment of Employment Judge Fowell sitting in the London (South) Employment Tribunal ("ET") dated 14 February 2018. By his Judgment he struck out a claim by the Claimant to have been unfairly dismissed by virtue of section 104 of the **Employment Rights Act 1996** ("ERA") for asserting a statutory right. He also ordered the Claimant to pay a deposit in respect of a claim by the Claimant to have been unfairly dismissed by virtue of the section 103A of the **ERA**, for making a protected disclosure.

The Background Facts

2. The Claimant was employed by the Respondent with effect from 13 October 2015 as a dispatch porter in West Middlesex University Hospital. He worked night shifts from an office shared with female staff employed on a help desk by a client of the Respondent. In April 2017 one of those female employees made an allegation against the Claimant of sexual harassment and assault. The Claimant was suspended. In early May two others made broadly similar allegations. The Respondent investigated the matter and layed disciplinary charges.

3. On 31 May 2016 a disciplinary hearing took place. Mr John Neckles, a Trade Union Official, represented the Claimant. Over the next two weeks there was further investigation into issues raised at the hearing. Then by letter dated 14 June 2017 the Respondent summarily dismissed the Claimant.

The ET Proceedings

4. Generally speaking, there is a two-year qualifying period before an employee may present a claim of unfair dismissal: see section 108(1) of the **ERA**. However, there are exceptions if a dismissal is unfair by virtue of section 104 or section 103A among other provisions. These were the two provisions on which the Claimant relied.

5. His case relating to these provisions stemmed from something he said at the disciplinary hearing on 31 May 2017. The words or the gist of them were as follows:

> **"I asked Innocent [a work colleague] to represent me as a member of staff and he told me that Kieran Hudson, the General Manager, asked him to back off from the case because whatever the case I am going to be sacked anyway and he should not get himself involved as that is what Vouygues UK Ltd want and a disciplinary officer has been told to dismiss me."**

6. This Claimant's case was that he was dismissed by virtue of making this allegation. There is a degree of improbability about this part of his case. For, if the Respondent had already made up its mind to dismiss the Claimant and given instructions to this effect, it seems difficult to see how a reaction to the allegation could be the principal reason for dismissal. However, for the purposes of a striking out application, the Claimant's factual case has generally to be taken at its highest and the Employment Judge ("EJ") assumed in the Claimant's favour that the words were said and were the reason for dismissal.

Statutory Provisions

7. Section 104 of the **ERA** provides as follows:

> **"104 Assertion of statutory right**
>
> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—**
>
> > **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> >
> > **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2) It is immaterial for the purposes of subsection (1)—**

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal],

….”

8. Section 104(4) continues with a substantial list of other relevant statutory provisions which I need not set out. Some of these provisions derive from UK law and others derive from EU law.

9. Section 104 is an example of a class of statutory provisions which are, putting it broadly at the moment, aimed at preventing dismissal in retaliation for bringing proceedings to enforce employment rights or asserting employment rights. There are other such provisions within the **ERA** and in several other enactments. I will refer to some of these later but it would overburden this Judgment to set them all out. There is a list in **Harvey on Industrial Relations and Employment Law** Division 1 Chapter 13 (to which I would add section 12 of the **Employment Relations Act 1999)**.

10. Section 103A of the **ERA** provides as follows:

“[103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.]”

11. Those disclosures which qualify for protection are set out in section 43B(1) of the **ERA**. It is sufficient for the purposes of this Judgment to say that any disclosure must, in the reasonable belief of the worker concerned, be made in the public interest.

The Employment Judge's Reasons

12. The EJ struck out the claim under section 104 for the following reasons:

> **"9…. Section 104(1)(b) requires an allegation "that the employer *had* infringed a right of his which is a relevant statutory right." The use of the past tense is significant. The right in question is the right not to suffer an unfair dismissal. If the assertion of this right can only be made after the dismissal it cannot then be relied on as a reason *for* dismissal. This interpretation prevents what I regard as a circular argument. Otherwise it could be said on any occasion when an employee complains that a dismissal would be unfair that they were dismissed for asserting a statutory right, and thus avoid the need for any period of qualifying service. That argument is unsustainable and that claim is therefore struck out as having no reasonable prospect of success."**

13. The EJ ordered a deposit in respect of the claim under section 103A because he assessed that there was little reasonable prospect that the Claimant would meet the public interest test. He referred to the Employment Appeal Tribunal ("EAT") decision in **Chesterton Global Limited & Anor v Nurmohamed** [2015] IRLR 614, which was then the leading decision on this question. He directed himself correctly that the question was not whether the allegation was in the public interest but whether the Claimant had a reasonable belief that it was in the public interest. He said that question could not be resolved without hearing evidence; but the point had little reasonable prospect of success.

Submissions

14. On behalf of the Claimant Mr Neckles has served a skeleton argument and a bundle. On behalf of the Respondent a skeleton argument has been served and it has been indicated that the Respondent will not attend today. I was expecting Mr Neckles to attend until this morning; but he emailed to explain why he would not be attending and specifically to request that the matter be adjudicated upon on paper after considering the parties' submissions.

15. If Mr Neckles had attended I would have taken him through other statutory provisions in the same family as sections 104 and 103A. I would have drawn his attention to **Mennell v Newell and Wright (Transport Contractors) Ltd** [1997] IRLR 519 to which I will refer below. I would also have discussed with him remarks of Her Honour Judge Eady QC to which I will refer in a moment. However, in the light of his specific request to proceed and in the light of the overriding objective applicable in the EAT, I think it is right to proceed with this hearing. I doubt whether the Claimant or Mr Neckles will think I have been unfair by doing my own research into this matter, especially since I will be drawing attention to a passage in **Mennell v Newell and Wright (Transport Contractors Ltd)**, which may support his case.

16. On the section 104 issue Mr Neckles submits that the EJ took an unduly narrow approach. The right not to be unfairly dismissed is intended to ensure that a dismissal is fair both substantively and procedurally. It is not concerned only with the moment of dismissal but with the process which leads up to it and the appeal which takes place afterwards. It is sufficient for the purposes of section 104(1)(b) that the Claimant alleges an infringement of the process prior to the moment of his allegation. It is not required that the dismissal itself should be prior to his allegation. On this view of the law, the Claimant's claim could not be struck out. He was asserting an infringement of his right not to be unfairly dismissed because he was alleging that the Respondent had already given way to pressure from others and made up its mind to deny the Claimant his rights. Mr Neckles seeks to rely on **Armstrong v Walter Scott Motors (London) Ltd** [2003] EAT/1768/02/TC.

17. At this point I will refer to observations of Her Honour Judge Eady QC when she considered this appeal on paper and sent it through to a Full Hearing. She said:

> **"Although it may be objected that the assertion of a future infringement of the right not to be unfairly dismissed will tend to lead to a circular argument (particularly where the complainant can only assert a right not to be unfairly dismissed if s/he can establish that the dismissal is for**

> **an automatically unfair reasons such as the assertion of an infringement of a statutory right), that would not be the case in respect of the assertion of an infringement of other statutory rights; the construction the ET has adopted would also apply (for example) to the assertion of a future infringement of the right not to suffer an unauthorised deduction of wages. It seems to me that the appeal thus raises a reasonably arguable question of construction…"**

18. Mr Neckles' submission, which I have recorded above, if read narrowly, would not address the concern which Her Honour Judge Eady identified. His submission was directed to establish that the Claimant was asserting a past infringement of his statutory right not to be unfairly dismissed whereas her concern was that, as interpreted by the EJ, section 104 would not cover an assertion of a threatened infringement of the statutory right in the future. However, Mr Neckles' submission does argue for a purposive construction to section 104, so I will treat it as extending additionally to an argument that section 104 ought to apply to an allegation that the employer threatened to infringe a statutory right in the future.

19. The Respondent has lodged a skeleton argument but has indicated that it does not intend to appear today. The skeleton argument supports the reasoning of the EJ. The writer argues that Parliament cannot have intended section 104 to apply merely by the pre-emptive assertion of the right not to be unfairly dismissed.

20. On the section 103A issue Mr Neckles submits that the landscape has changed as a result of the Decision of the Court of Appeal in **Chesterton** [2018] ICR 731. The Claimant's complaint that, as Mr Neckles put it, "*public pressure*" was motivating the Respondent fell within the principles set out by the Court of Appeal in **Chesterton**. The Respondent again supports the reasoning of the EJ.

Discussion and Conclusions

21. Section 104(1)(b) focuses on the existence and nature of an allegation by the employee. The questions for the ET are whether the employee made an allegation of a type covered by section 104 and whether this was the principal reason for his dismissal. The employee does not have to prove the truth of the allegation or even the existence of the right so long as the allegation is made in good faith.

22. The leading case is **Mennell v Newell and Wright (Transport Contractors Ltd)**. Mummery LJ said:

> **"28.…. On this point I agree with the Employment Appeal Tribunal that the industrial tribunal were wrong to construe s.60A as confined to cases where the right under the Wages Act had been infringed. It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for his dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith. The important point for present purposes is that the employee must have made an allegation of the kind protected by s.60A; if he had not, the making of such an allegation could not have been the reason for his dismissal."**

23. In **Mennell** the employee lost his case because he did not make an allegation of any kind: see Mummery LJ at paragraph 29. He had refused to sign a new contract but he had not explained why. His explanation after dismissal that he was concerned about a working time matter was not sufficient. Therefore, **Mennell** was not decided in the Court of Appeal by finding that the allegation related to a threatened rather than an actual infringement.

24. The EAT had, however, said the following, quoted by Mummery LJ in his Judgment at paragraph 21:

> **"(3). Reverting to s.60A, subsection (1)(a) applies where the employee *has* brought proceedings against the employer to enforce a relevant statutory right. That would cover, inter alia, a complaint to an industrial tribunal under s.5 of the Wages Act.**
>
> **(4). However, s.60A(1)(b) goes further. It is enough that the employee alleges in good faith that his employer has infringed a relevant statutory right. There is no requirement that the employer has actually infringed the statutory right (s.60(A)(2)).**

(5). Thus, in this case, if the facts be that the employer sought by threat of dismissal to impose a variation of the contract of employment to incorporate a term which negated the employee's statutory right not to suffer a reduction of wages without his freely given consent, that is, or might be, an infringement of his statutory right at the time when the threat is made, bearing in mind the words of s.60A (2)."

25. In his Judgment in the Court of Appeal Mummery LJ approved paragraph (4) of the reasoning of the EAT, which I have just quoted. As far as I can see he did not approve or discuss paragraph (5), no doubt because as I have explained the employee made no allegation at all in that case. I do not think paragraph (5) follows from paragraph (4). An allegation in good faith that the employer has infringed a statutory right cannot be equated with an allegation that the employer has threatened to or proposed to infringe a statutory right in the future; the two are different things.

26. Nor, in my judgement, does **Armstrong** take the matter any further. That case was concerned with a different issue - whether the allegation of the employee was an allegation of an infringement of a statutory right. The point with which that case is concerned probably did not arise. If it did, it was not decided by the ET or the EAT.

27. In my judgment the starting point must be the language of section 104 itself. Read naturally, section 104(1)(b) requires an allegation by the employee that there has been an infringement of a statutory right. An allegation that there may be a breach in the future is not sufficient. The thrust of the allegation must be, "*you have infringed my right*," not merely "*you will infringe my right*."

28. It is true that section 104(1)(b) read naturally in this way does not provide as much protection as it could. The same can be said of section 104(1)(a). Here the employer's reason must be that the employee has brought proceedings against the employer of a particular kind. I

cannot see any normal canon of construction whereby it would suffice if the reason were that the employee proposed to bring such proceedings.

29. In these respects, section 104 is more narrowly drafted than other members of the same family of provisions. The drafting techniques in the family are not always precisely the same and I do not need to go through the provisions individually. However, in contradistinction to section 104(1)(a) other provisions are often drafted so that the employer's reason may relate to proposed proceedings as well as actual proceedings or proposed action as well as actual action; see for example section 104A to 104E. In practice these provisions will sometimes give protection where section 104 does not since they apply to cases of proposed action as well as actual action.

30. Section 104 was one of the first of this family of provisions. It was inserted into the **Employment Protection (Consolidation) Act 1978** by the **Trade Union Reform and Enforcement of Rights Act 1993**. But it was not the first. The **1978 Act** already contained a provision, section 58, which rendered automatically unfair dismissal related to Trade Union membership, defined to include not only actual but proposed action: see section 58 of the **Employment Protection Consolidation Act 1978**.

31. In my judgment sections 104(1)(a) and (b) must be given their natural meaning. It is true that they could both have been drafted to afford wider protection; but it is not possible within ordinary canons of construction to interpret them as if they did. It would, for example, be impossible to know what criterion to apply in section 104(1)(b). Would it be sufficient for the employee to allege that an infringement may take place or would the allegation have to encompass a threat of infringement or a proposal to infringe or an intention to infringe?

32. In my judgment therefore the EJ was correct in his interpretation of section 104(1)(b). In the context of the right not to be unfairly dismissed, it requires an allegation by the employee that he has been unfairly dismissed, not merely that the employer is taking action, which will or threatens to or may result in an unfair dismissal in the future.

33. It follows that I do not accept Mr Neckles' argument. Although the Claimant was complaining of unfairness in the procedure adopted and of a settled intention to dismiss him in the future, he was not alleging that he had been dismissed already. Indeed, he and Mr Neckles were at a disciplinary hearing seeking to avoid precisely that result.

34. In the context of the right not to be unfairly dismissed, the application of the normal meaning to section 104(1)(b) produces an entirely sensible result and avoids the potentially unfortunate consequences outlined by the EJ in paragraph 9 of his Reasons. Applied to other statutory rights, the protection afforded by section 104(1)(b) may be narrower than one would wish; but this seems to me to be a matter for Parliament. If section 104 were to be widened, Parliament might well make different provision for the right not to be unfairly dismissed.

35. As I leave this part of the appeal, I should mention one further point. The right not to be unfairly dismissed derives from UK statute law. It is not a right derived from EU law. However, there are statutory rights to which section 104 applies which derived from EU law. Whether in respect of those rights EU law might require section 104 to be read more extensively is not a matter with which I am concerned or on which I have received submissions today. This judgment should not be read as expressing any opinion on that question.

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36. I turn finally to the section 103A point. I can deal with this briefly. The EJ applied the correct legal test both in respect of an application for a deposit Order and in respect of the definition which a disclosure must meet to qualify for protection. So long as he applied the correct legal test, it was a matter for his judgement whether the claim had little reasonable prospect of success. I see no error of law in his reasoning. I do not think that for the purpose of making a broad assessment at the deposit Order stage, it was necessary to engage in detailed analysis of the kind which **Chesterton** in the Court of Appeal discusses.

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37. I do not agree with Mr Neckles' characterisation of the Claimant's allegation as being about "*public pressure*." The Claimant was not referring to public pressure. He was referring to the employer of the three women who made complaints of sexual assault and harassment. The concerns of that employer were specific to his case as of course were the disciplinary proceedings. There was no particular public element to them.

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38. For these Reasons, the appeal will be dismissed.

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